



Attorney General  
STATE CAPITOL  
Phoenix, Arizona 85007

Robert R. Corbin

February 28, 1983

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ARIZONA ATTORNEY GENERAL

INTERAGENCY

The Honorable S. H. "Hal" Runyan  
Arizona State Senator  
Senate Wing, State Capitol  
Phoenix, AZ 85007

Re: I83- 016 (R83-023)

Dear Senator Runyan:

You have asked whether a school district is authorized to enter into contracts with an architect and multiple contractors under which the architect, for compensation as an additional service under A.R.S. § 34-104, would administer contracts with all of the several specialty contractors (mechanical, electrical, plumbing, heating, concrete, roofing, etc.) whose services would be necessary to construct a building or structure.

The arrangement about which you have inquired is essentially the same as that addressed in Ariz.Atty.Gen.Op. 77-192 (R77-165), in which we concluded that both Title 34 and Title 35, Arizona Revised Statutes, and particularly §§ 34-202, 34-221 and 35-460, required that a school district must enter into a contract with a single general contractor who would be responsible for the construction of an entire project encompassed in an architect's working drawings and details of the project, with some discretion being allowed a governmental entity to construct a project in phases as funds became available under successive contracts with general contractors. A copy of the 1977 opinion is enclosed.

Although several changes in legislation have occurred since our 1977 opinion, we have concluded that the result nevertheless continues to be the same.

The Legislature in 1981 deleted from A.R.S. § 35-460 the requirement that contracts for the construction of school district buildings from the proceeds of bond sales be awarded in accordance with that section. See Laws, 1981, Ch. 98, § 1, par. 11. This change was not significant as it relates to your question, because Title 34 independently of Title 35 would mandate the conclusion reached in our 1977 opinion.

In 1981, the Legislature also enacted A.R.S. § 15-213, which directed the State Board of Education to adopt rules prescribing "uniform and competitive bidding, contracting and purchasing practices for all school districts in this state as provided in §§ 34-201, 41-730 and 41-1051 through 41-1056. . . ." The Board of Education has promulgated a rule that incorporates the bidding requirements of § 34-201. See A.C.R.R. R7-2-701.B, a copy of which is attached hereto.

Because of this change, we have considered whether the Legislature, in referring to § 34-201 in § 15-213, intended that none of the provisions of Title 34 other than § 34-201 should be applicable to school district construction projects and have concluded that § 15-213 was not intended to restrict the application of Title 34.

Title 34 is a comprehensive scheme, applicable statewide to all levels of government, for the construction of public buildings. See A.R.S. § 34-101. Title 34 deals with such subjects as the selection of architects, engineers and other professionals, procedures for bidding and awarding of contracts, mandatory provisions in contracts with successful bidders, progress payments, contractors' performance bonds, eligibility of subcontractor preferences and building standards. That school districts are subject to Title 34 was made certain in School District Number One of Pima County v. Hastings, 106 Ariz. 175, 472 P.2d 44 (1970).

On the other hand, the bidding requirements of A.R.S. §§ 41-730 and 41-1051 through 41-1056, which apply to the acquisition of goods and services, had not been applicable to school districts prior to the enactment of § 15-213 and the promulgation of A.C.R.R. R7-2-701. The purpose of § 15-213 appears to have been to bring about the conformity of school district contracting with state laws generally applicable to all state contracts. We find nothing to indicate that all of Title 34, to the extent provided in Title 34, should not continue to be applicable to school districts.

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In the situation that you have described to us, the school district would not be entering into a contract with one general contractor who would undertake overall responsibility for the construction of all of the work involved in the project. That omission contravenes the requirements of Title 34.

Sincerely,



BOB CORBIN  
Attorney General

BC:FWS:lm

Enclosure: Atty.Gen.Op. 77-192

ee, the contract manager must determine the total cost of the construction project to fix the liability of the district. Four, the contract manager must provide performance and payment bonds in the amount of the construction project. This is required by the bidding statutes.

In School Opinion No. 76-14, this office interpreted the bidding statutes in Title 34 liberally in order to allow this new type of construction contracting. Apparently the Attorney General is of the opinion they should be interpreted more strictly. Before issuing your proposed contract, I suggest you wait for the Attorney General's opinion.

A copy of this opinion is being sent to the Attorney General along with a copy of your proposed contract management contract.

Yours very truly,

MOISE BERGER  
Maricopa County Attorney

*Q. Dale Hatch*  
Q. Dale Hatch  
Deputy County Attorney

QDH:mfg

Enc.



DEPARTMENT OF LAW  
OFFICE OF THE  
Attorney General  
STATE CAPITOL  
Phoenix, Arizona 85007

*John Wright*  
BRUCE E. BABBITT  
ATTORNEY GENERAL

October 21, 1977

Mr. Q. Dale Hatch  
Deputy Maricopa County Attorney  
101 West Jefferson Street  
Phoenix, Arizona 85003

Re: 77- 192 (R77-165)

Dear Mr. Hatch:

I have reviewed your March 22, 1976 opinion and its later addendum, addressed to Mr. James L. Heath, Associate Superintendent for Business Services at Phoenix Elementary School District No. 1. Mr. Heath asked whether the school district could use "construction management," instead of a general contractor, to build one or more school buildings. You have asked, in lieu of our review of a definite opinion from you, that we write an opinion responding to Mr. Heath's question. The following is that opinion.

Though the school district's proposal is lacking in detail, the main features of its construction management plan appear to be: (1) The board of trustees would contract directly for specialized services, which normally would be subcontracted under a general contractor. A general contractor would not be used. The board's contracts with the various trade specialists, such as plumbing and electrical contractors, would be entered into when their services are required, after bids have been requested and evaluated. (2) The board of trustees would hire a management consultant to control the project and keep the board of trustees informed of exactly when bids should be requested from various trades.

The school district's proposal does not comply with statutory requirements and therefore cannot be implemented. First, no single contractor would be responsible for the entire building project or available to contract for performance of the proposed work. A.R.S. § 34-201.A requires that an "agent,"<sup>1</sup>

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<sup>1</sup> A school district is an "agent" for purposes of this section. See School Dist. No. 1 of Pima Co. v. Hastings, 106 Ariz. 175, 472 P.2d 144 (1970).

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after approving the working drawings and specifications for a proposed building, "publish a notice to contractors of intention to receive bids and contract for the proposed work . . ." (emphasis supplied). A.R.S. § 34-202.A provides:

Proposals for construction of buildings or structures, or additions and alterations thereto, shall be accompanied by bids for all of the proposed work, signed by a responsible contractor . . . (Emphasis supplied.)

These statutes contemplate solicitation and receipt of bids from contractors for the entire project, with each submitted bid signed by one general contractor. A.R.S. § 34-221.A requires the school district to "enter into a contract with the lowest responsible bidder whose proposal is satisfactory . . ." (Emphasis supplied.) The contract for the project "shall be signed by the agent [school district] and the contractor." (Emphasis supplied.) A.R.S. § 34-221.B. If bonds are issued for the purpose of erecting and furnishing a public building, the contract, according to A.R.S. § 35-460.C, shall be awarded for "erecting and furnishing the building to the lowest and most responsible bidder. . . ." When a bid is accepted, the school district must "require the successful bidder to enter into a written contract for erecting, completing and furnishing the building. . . ." A.R.S. § 35-460.D.

Though there are no appellate cases in Arizona squarely on point, two cases obliquely approve a modified form of phased<sup>2</sup> construction. In Arnold Construction, Inc. v. Arizona Board of Regents, 109 Ariz. 495, 512 P.2d 1229 (1973), the only issue before the Court was whether a general contractor with a license allowing it to perform the entire construction of the physics and geology addition at Arizona State University was required to have a different type of contractor's license since only a portion of the building was being constructed that year. The Regents had insufficient funds from legislative appropriation to complete the entire building during the particular fiscal year. By way of dictum, the Court approved the Regents' election "to have the construction of the building proceed in separate phases or stages." 109 Ariz. at 499, 512 P.2d at 1233. The Court's analysis was based upon the

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<sup>2</sup> Phased construction is the building of a project in distinct phases, separately bid, though not necessarily by trade specialty.

simple proposition that if the owner of a construction project has sufficient money to build only a portion, then that may be done. The Court undertook no statutory analysis.

In Secrist v. Diedrich, 6 Ariz.App. 102, 430 P.2d 448 (1967), the Court of Appeals considered the divisibility of a construction project between landscaping and actual construction of a building. The only issue before the Court, however, was whether the landscaping portion was subject to competitive bidding. Though the Court concluded that competitive bidding was required, inasmuch as the landscaping costs would exceed \$2,500 under the predecessor provision to A.R.S. § 34-201.C, by way of dictum it found phase construction to be reasonable if "the landscaping work could be performed by regular employees of the school district, with a possible saving in cost. . . ." 6 Ariz.App. at 105, 430 P.2d at 451, so long as it did not appear that the school district was segregating the landscaping portion of the contract in order to evade statutory competitive bidding requirements, the Court finding that landscaping is not an integral part of a building project. Neither Arnold nor Secrist provide any support for the concept of construction management.

The school district's proposal here also fails to comply with the requirements for performance and payment bonds. A.R.S. § 35-460.D requires the successful bidder for the "erecting, completing and furnishing" of a building to obtain bonds required by A.R.S. § 34-221, et seq. The surety bonds provided for by A.R.S. § 34-221, are mandatory and their requirements are outlined in A.R.S. § 34-222.A:

. . . Before any contract is executed with any person for the construction, alteration, or repair of any public building, a public work or improvement . . . , he shall furnish to the agent [school district] entering into such contract, the following bonds which shall become binding upon the award of the contract to such person, who, for purposes of this article, means 'contractor':

1. A performance bond in an amount equal to the full contract amount . . .

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<sup>3</sup> The main contracts in both cases had been let to general contractors.

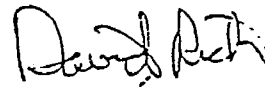
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2. A payment bond in an amount equal to  
the full contract amount . . ." (Emphasis  
supplied.)

This section applies whether the project is financed by  
general obligation bonds, current revenue or other sources.  
The school district's construction management proposal, as  
outlined, cannot comply with these bonding requirements.

Sincerely,

BRUCE E. BABBITT  
Attorney General



DAVID RICH  
Assistant Attorney General

DR:jrs



# OFFICE OF THE MARICOPA COUNTY ATTORNEY

MOISE BERGER COUNTY ATTORNEY

400 SUPERIOR COURT BUILDING, 101 W. JEFFERSON, PHOENIX, ARIZONA



March 22, 1976

School Opinion No. 76-14

Mr. James L. Heath,  
Assistant Superintendent  
Business Services  
School District No. 1  
125 East Lincoln Street  
Phoenix, Arizona 85004

Dear Mr. Heath:

This opinion is in response to your request for an opinion on the following question:

Under existing statutes may the Board of Trustees enter into a contract for construction management services described in the attached material for the purpose of constructing one or more schools?

ANSWER:

Yes.

## DISCUSSION:

It is my understanding that the Board of Trustees is interested in using a new technique in contracting for the construction of several new school buildings. The technique is referred to as construction management and, instead of using a general contractor, the Board of Trustees acts as the general contractor but hires a management consultant to help manage the construction project. The Board calls for bids and awards contracts to contractors for various phases of the job whenever the management consultant indicates such a course is appropriate. The contract with the management consultant will be awarded by competitive bidding. The Board of Trustees wants to know if this will violate the bidding law set out in A.R.S. §34-201 et seq.

also understand this procedure has been used in Pima County to construct several public works and it has been approved by the Attorney General as complying with the competitive bidding statutes.

A.R.S. §34-201 et seq. were originally enacted in the early 1900s and were structured to allow the school districts to contract with general contractors who in turn would contract with sub-contractors to perform the work. The Legislature obviously desired competitive bidding by school boards and others whenever school buildings were to be erected or altered.

It is my opinion that the statutes are written broadly enough and can be interpreted liberally enough to allow the use of the technique of construction known as construction management. According to the above-referenced statutes, the Board of Trustees may receive bids for any proposed work and can award the contract to the lowest responsible bidder. The important point is to make sure that all contracts are awarded as a result of competitive bidding. If the Board of Trustees complies with these requirements, it is my opinion that it would be complying with the above-referenced statutes.

A copy of this opinion is being sent to the Attorney General for his concurrence or revision, and I suggest that you wait for his opinion.

Very truly yours,

MOISE BERGER  
MARICOPA COUNTY ATTORNEY

Q. DALE HATCH  
Q. Dale Hatch  
Deputy County Attorney

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